

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY
NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUL 31 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

EDMUNDO CORDERO,

Plaintiff/Appellant,

v.

MICHAEL A. BOSCO, JR. and

TIFFANY & BOSCO, P.A.,

Defendants/Appellees.

2 CA-CV 2008-0030

DEPARTMENT A

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20074422

Honorable John F. Kelly, Judge

VACATED AND REMANDED

Edmundo Cordero

Tucson
In Propria Persona

Tiffany & Bosco, P.A.
By Dow Glenn Ostlund

Phoenix
Attorneys for
Defendants/Appellees

B R A M M E R, Judge.

¶1 Appellant Edmundo Cordero appeals the trial court’s dismissal of his claims against appellees, Tiffany & Bosco, P.A. and Michael Bosco, Jr. (collectively, Bosco). We vacate the order dismissing those claims and remand the case to the trial court.

Factual and Procedural Background

¶2 The relevant facts are undisputed. In August 2007, Cordero filed a civil complaint against Bosco.¹ Bosco moved to dismiss Cordero’s claims, arguing Cordero had failed to state a claim upon which relief could be granted. *See* Ariz. R. Civ. P. 12(b)(6). After considering Bosco’s motion and Cordero’s response, and without oral argument by the parties, the trial court ordered that Cordero had “thirty (30) days to file an amended complaint or defendants’ motion to dismiss will be granted.” The order was filed on November 8, 2007. Thirty-four days later, on December 12, Cordero filed an amended complaint, which he had signed and mailed to Bosco the previous day. Also on December 12, the court signed an order dismissing Cordero’s claims because he had failed to file an amended complaint within thirty days of November 8. The order of dismissal was entered on December 13. This appeal followed.

Discussion

¶3 Cordero argues the trial court erred in granting Bosco’s motion to dismiss because his amended complaint was, in fact, timely filed. Relying on Rule 6(e), Ariz. R. Civ. P., Cordero asserts the trial court incorrectly computed the filing deadline because it

¹Cordero’s complaint also named Thomas Curti, Lois Curti, and Thomas A. Curti Profit Sharing Plan as defendants. The trial court dismissed those defendants because Cordero had failed to timely serve them, and they are not parties to this appeal.

failed to allow an additional five days for mailing of its November 8 order. We review the interpretation and application of court rules de novo. *See Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 49, 180 P.3d 986, 1001 (App. 2008).

¶4 Rule 6(e) states in pertinent part:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served by [U.S. mail], five calendar days shall be added to the prescribed period.

See also Ariz. R. Civ. P. 58(e) (court clerk “shall distribute, either by U.S. mail, electronic mail, or attorney drop box, copies of all minute entries to all parties”). Our supreme court held in *Desmond v. J.W. Hancock Enters., Inc.*, 123 Ariz. 474, 476-77, 600 P.2d 1106, 1108-09 (1979) that a trial court erred in finding an amended complaint untimely filed when it failed to add five days to the filing period pursuant to Rule 6(e). We find this precedent controlling here.

¶5 The clerk of the court sent Cordero copies of the November 8 order, as well as all other minute entries, by mail. Although Cordero states he never received a copy of the November 8 order,² we find no authority suggesting a party’s failure to receive a document served by mail renders Rule 6(e) inapplicable. *See* Ariz. R. Civ. P. 5(c)(2)(C) (“service [by U.S. mail] is complete upon mailing”); *McEvoy v. Aerotek, Inc.*, 201 Ariz. 300, ¶ 19, 34 P.3d 979, 983 (App. 2001) (validity of service not dependent upon receipt). Bosco, moreover, all

²Cordero apparently learned of that order after calling either the clerk of the superior court or the judge’s chambers to inquire about the status of Bosco’s motion to dismiss.

but concedes error by failing to respond substantively to Cordero’s arguments and electing to take no position on the merits of this appeal. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 7, 32 P.3d 39, 42 (App. 2001) (failure to address in answering brief issues raised on appeal “can be considered a confession of error”).

¶6 The trial court apparently failed to consider that Rule 6(e) gave Cordero five extra days for mailing in addition to the thirty-day filing period prescribed by the court when it calculated the last day for filing the amended complaint. Because Cordero in fact filed his amended complaint within thirty-five days of the court’s November 8 order, the court erred in finding the amended complaint untimely. Accordingly, we vacate the order dismissing Cordero’s action against Bosco and remand the case to the trial court for proceedings consistent with this decision.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge